United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1242

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1242

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RAYMOND RICKMAN, RICHARD SMITH,

Defendants - Appellants.

BRIEF FOR THE APPELLANT RICHARD SMITH PURSUANT TO ANDERS v. CALIFORNIA

On Appeal from the United States District Court
Eastern District of New York

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BRIEF FOR THE APPELLANT
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PRELIMINARY STATEMENT

Richard Smith appeals from a judgment of conviction entered on June 27, 1975 in the United States District Court for the Eastern District of New York after a four-day trial before the Honorable Jack B. Weinstein and a jury.

Indictment 75 Cr. 239 was filed on March 25, 1975. It charges the defendant in two counts with robbery of the Chase Manhattan Bank, 190-02 Jamaica Avenue, Queens, New York on December 23, 1974 in violation of Title 18 U.S.C. § 2113(a) (d) and 2. A motion for an order to suppress items of physical evidence and certain statements allegedly made by the defendant, filed on April 29, 1975, was denied after a hearing on May 5, 1975 before the Honorable Jack B. Weinstein. Trial commenced before a jury on May 5, 1975 and the jury

retired to deliberate on May 7, 1975. At 2:00 p.m. on May 8, 1975 the jury returned a verdict of guilty on both counts. On June 27, 1975 the defendant Smith was sentenced to a term of imprisonment of fifteen years pursuant to Title 18 U.S.C. § 4208(a)(2). He is presently serving that sentence.

QUESTION PRESENTED

Whether the Court erred in denying, after an evidentiary hearing, defendant's motion to suppress evidence seized by the police in a warrantless search of the defendant's automobile.

STATEMENT OF FACTS

At approximately 10:30 a.m. on December 23, 1974 three black men, two of them about six foot three inches tall and the third about five foot ten inches tall, entered a branch of The Chase Manhattan Bank, 190-02 Jamaica Avenue, Queens, New York. All three men wore hats and ski sweaters which were adjusted to partially conceal their faces (Tr. II 58).* All of the people in the bank were told to "Hit the floor" (Tr. II 57). One of the taller black men entering the bank placed a shotgun to the side of Joseph Leader, the bank guard, removed

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* References with the prefix "Tr. I" are to the transcript of the suppression hearing held on May 5, 1975. References with the prefix "Tr. II" are to the transcript of the trial held on May 6, 7 and 8.

Mr. Leader's gun, and positioned him up against a glass door at the rear of the bank. As Mr. Leader stood facing the plate glass door he was able to see the reflection of what was occurring in the bank. Mr. Leader saw the man with the shotgun position himself at the front of the bank while one of the other men vaulted the counter. After about three minutes the man at the front of the bank yelled "Let's go, let's go" and the other two men jumped back over the counter and went directly to the front door in the vestibule (Tr. II 61-63). As the other two left the bank, the man at the front door with the shotgun said "Freeze, and don't nobody move". He then fired the shotgun once, hitting a man lying on the floor of the bank (Tr. II 64-65). Mr. Leader at trial identified the man with the shotgun as the defendant Richard Smith (Tr. II 82).

At 10:37 a.m. that same day, John Kugler, a bus driver, had his bus stopped in front of the bank (Tr. II 113-114). Mr. Kugler testified that he heard a loud noise come from the bank and that he saw two black men exit the bank, quickly followed by a third (Tr. II 117-118). One man was carrying what appeared to be a pillow case while a second man's hands were clutched against his coat. The men ran down Jamaica Avenue toward 191st Street and entered a white four-door 1967 Ford sedan which was parked 30 feet in front of Mr. Kugler's bus (Tr. II 119). The driver was waiting in the car with the

engine running (Tr. II 144-145). Mr. Kugler noted the license plate number was 919 QQU (Tr. II 124). He then proceeded past the parked Ford in his bus to a red light at 191st Street and Jamaica Avenue. While waiting at the light, Mr. Kugler saw the white Ford come around the left side of the bus and make a right turn onto 191st Street through the red light (Tr. II 128).

Mr. Wayne Butler, a civilian employee for the New York City Police Department, was a passenger on Mr. Kugler's bus when it was stopped in front of the bank. Mr. Butler was about to exit from the rear of the bus when he too heard a loud report come from the bank (Tr. II 149-150). Mr. Butler observed two black men leave the bank. One was carrying a rifle against his coat, the other was carrying what appeared to be a pillow case. Both men ran toward 191st Street and entered a white Ford. Mr. Butler identified the man carrying the rifle as co-defendant Raymond Rickman (Tr. II 152).

At 10:45 a.m. on the same day, Herbert Marin, medical technologist, was in his car parked at a stop sign at the corner of 191st Street on Woodhull Avenue. A white Ford went through the stop sign, passing Mr. Marin in his car on the left side (Tr. II 178). The Ford drove down 191st Street and then onto Woodhull Avenue. Mr. Marin followed the Ford in his own car and observed the following events. The Ford stopped at 193rd and Woodhull, two black men exited, one about five foot ten inches, the other about six foot, and the Ford sped off (Tr. II 179-180). The two men walked

through a tunnel that led from Woodhull Avenue and 193rd Street to 99th Avenue. They then exited the tunnel, walked to 193rd Street toward 100th Avenue, entered a brown Oldsmobile and drove off (Tr. II 182-185).

Anthony Webb, 14 year old student, was bicycling home from a store when he saw a car speeding down Woodhull Avenue, stop, and let two black men out (Tr. II 234). He followed the two men through the tunnel that leads to 99th Avenue and saw them enter a dark brown car bearing the license plate number 464 YGY (Tr. II 241). Agent Bruce Brotman of the Federal Bureau of Investigation checked that registration number with the Motor Vehicle Bureau and learned that the car was owned by Mrs. Gaynell Smith, mother of the defendant Richard Smith. Agent Brotman, accompanied by other agents, spoke with Mrs. Smith at her home. Mrs. Smith consented to a search of her car and indicated that her son Richard was in possession of the car (Tr. I 8-9).

At 3:15 p.m. that afternoon FBI agents came upon Richard Smith driving the 1972 brown Oldsmobile, 464 YGY. They stopped the car and arrested him. Agent Brotman removed the keys and conducted a cursory search of the vehicle, observing a device called a "slap hammer" (a tool used to remove automobile ignition switches) in the trunk (Tr. II 253-254, 264). The car was brought to the 113th Precinct, impounded and later that afternoon was searched by Special Agent James Murphy. The "slap hammer" was removed and sent to the

FBI laboratory for analysis. At trial, Special Agent Robert W. Sibert testified that an ignition switch found in the "slap hammer" was taken from the 1967 white Ford sedan identified as the car used in fleeing the bank (Tr. II 366).

Smith was handcuffed, taken into custody and questioned at the 113th Precinct. He was advised of his constitutional rights by Special Agent Murphy (Tr. II 271). Judge Weinstein, in denying the motion to suppress statements made by defendant Smith, found that he was informed of his rights and that he gave his statements voluntarily (Tr. I 79). Agent Murphy testified at trial to the oral statements made by defendant Smith during his questioning.

STATEMENT OF POSSIBLE LEGAL ISSUES

THE DENIAL OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM THE AUTOMOBILE

A. The Validity Of Mrs. Smith's Consent To Search An Automobile In The Possession Of Her Son

An issue could be raised with respect to whether or not Mrs. Smith in fact voluntarily consented to the search of her car. Agent Brotman, accompanied by Detective Carabella and several other agents, went to the home of Mrs. Smith on the afternoon of December 23, 1974. Mrs. Smith indicated that she was the owner of the car and that her son had had possession of the car for the last two or three days (Tr. I 8-9). Agent Brotman told Mrs. Smith that her car was believed to

have been used in a robbery (Tr. I 17, 22), and that when they located her son Richard and the car, he wanted permission to search the vehicle. He advised her that if she did not want them to conduct a search, it would not be done (Tr. I 9). Agent Brotman testified that Mrs. Smith gave her permission to search the automobile (Tr. I 9). Agent Brotman did not have a consent to search form, nor did he ask Mrs. Smith to give any written consent (Tr. I 23).

Mrs. Smith's testimony on the motion to suppress conflicted with that of Agent Brotman. Although she testified that she told Agent Brotman that she was the owner of the car, she stated that Agent Brotman never asked for her consent to search the car (Tr. I 75), and that she never gave such consent (Tr. I 76). She further testified that the agent did not ask when she had given the car to her son (Tr. I 75), and that she did not tell him that her son had been using the car for the past two or three days (Tr. I 77). Judge Weinstein, however, believed the testimony of Agent Brotman, that permission to search the car was granted and that such consent came from the owner of the car (Tr. I 78-79). The Court stated:

> I found, based upon my view of the witness (Mrs. Smith), that she was not telling the truth. I don't think she remembered what happened, but the Agents did. They did recollect accurately what did happen. She was confused at the time. And now that her son is in this trouble, I think her memory is playing tricks on her. I believe that she is not a credible witness and that the Agent was (Tr. II 585).

This finding of fact involving an assessment of the credibility of witnesses is not subject to review on appeal. United States v. Miley, 513 F.2d 1191, 1201 (2d Cir. 1975); United States v. Boston, 508 F.2d 1171, 1179 (2d Cir. 1974); United States v. Faruolo, 506 F.2d 490, 493 (2d Cir. 1974); United States v. Fernandez, 456 F.2d 638, 640 (2d Cir. 1972); United States v. McGuire, 381 F.2d 306 315 (2d Cir. 1967), cert. denied, 389 U.S. 1053 (1968).

It could also be argued that Mrs. Smith's consent was not legally effective with respect to her son, the defendant. It is well established, however, that the consent of one who shares common authority or possession over premises or effects is sufficient to make the search lawful as against an absent, nonconsenting person with whom such joint access or control is shared. United States v. Matlock, 415 U.S 164, 170 (1974); Frazier v. Cupp, 394 U.S 731, 740 (1969); United States v. Ellis, 461 F.2d 962, 967-968 (2d Cir.), cert. denied, 409 U.S. 866 (1972); United States v. Gargiso, 456 F.2d 584, 587 (2d Cir. 1972). Here, Mrs. Smith, the owner of the car shared the use and control of it with her son. She too would have had standing to consent to the search.

It could be argued on the other hand, that this case is distinguishable from those referred to above on the ground that in those cases the consenting party was at the scene of the search, whereas the nonconsenting party was not. Here, the situation is reversed in that it was the person who gave the consent who was absent.

I have found no authority to support an argument that this factual difference would take this case outside the general rule. Nevertheless, if Mrs. Smith's consent constituted the only justification for the search, I believe there would be an arguable issue on an appeal. The Court, however, denied the motion to suppress on an additional ground.

The Court found that there was probable cause to arrest defendant Smith at the time he was arrested and the search was lawful on the ground that it was incident to that arrest (Tr. I 79). This finding appears to me to be entirely correct. The defendant was found driving the getaway car hours after the robbery. He generally matched the description of one of the bank robbers (Tr. I 49, 59). According to the agents, the defendant's mother had told them that the defendant had been using the car for the last several days. The Court accepted that testimony. The car was searched in an effort to discover explosives or other weapons which could jeopardize the safety of the arresting agents (Tr. I 30, 36). In these circumstances, the police would have had probable cause to arrest the defendant and to conduct a search of the

car for weapons and evidence incident to that arrest. Chimel v. California, 395 U.S. 752 (1969); United States v. Edwards, 415 U.S. 800 (1973); United States v. Robinson, 414 U.S. 218 (1973); Cady v. Dombrowski, 413 U.S. 433 (1972); Adams v. Williams, 407 U.S. 143 (1972).

Finally, the warrantless search of the automobile would seem to have been clearly justified under the "automobile exception" to the search warrant requirement. Within five hours after the bank robbery occurred, FBI agents located the automobile which had been used by the robbers in effecting a getaway. At this point, the robbers had not yet been apprehended and the money and weapons had not been recovered.

This exception was explained by the Supreme Court in Carroll v. United States, 267 U.S. 132 (1925), Chambers v. Maroney, 399 U.S. 42 (1970) and Coolidge v. New Hampshire, 403 U.S. 443 (1971). See also Cardwell v. Lewis, 417 U.S. 583, 590-596 (1973); United States Ex Rel. LaBelle v. LaVallee, 517 F.2d. 750, 755-756 (2d Cir. 1975). In summarizing Chambers v. Maroney, supra, this Court said in United States v. Ellis, supra, that:

> [T]he underlying rationale of the 'automobile exception' is that exigent circumstances justify the warrantless search of an automobile, when there is probable cause, where 'the opportunity to search is fleeting ...' 461 F.2d at 966.

Unlike the car in United States v. Ellis, supra, which was found in a parking lot, the 1972 Oldsmobile in

this case was stopped while making a U-turn on a public highway. In Chambers v. Maroney, supra, the Court upheld the search and seizure of an automobile which was moving on a public road. See also United States v. Carneglia, 468 F.2d 1084, 1089-1090 (2d Cir. 1972).

Waiting for a warrant in the case at bar would have aided the other robbery participants in making their escape. Placing a guard by the car would have taken away from the man power being used to seek out the other participants. United States v. Ellis, supra at 966. United States v. Carneglia, supra at 1089-1090. Inasmuch as the defendant was stopped in the Oldsmobile a short time after the bank robbery, it was reasonable to believe that the other participants were still in the vicinity. To have waited for a warrant would have wasted valuable time which could have been used to search the area for the other participants.

In short, it appears that there were three independent grounds for upholding the search of the automobile as lawful - any one of which would suffice.

B. The Search Of The Automobile After It Was Impounded By The Police And An Opportunity To Obtain a Warrant Existed

When the car was seized at about 3:15 p.m. Agent Brotman conducted a cursory search of the vehicle. The car was brought to the 113th Precinct, impounded and later that afternoon was searched by Agent Murphy. Defense counsel below argued that inasmuch as an opportunity existed to

obtain a warrant the search made by Agent Murphy without a warrant was unlawful. The law is clear, however, that if the initial seizure is lawful, a later warrantless search is also valid. Cardwell v. Lewis, supra at 592-596; Chambers v. Maroney, supra at 52; United States Ex Rel. LaBelle v. LaVallee, supra at 755-756; United States v. Carneglia, supra at 1090; United States v. Ellis, supra at 965-967. In Chambers v. Maroney, supra, the search took place many hours* later at the police station when all suspects were in custody. The rationale of Chambers v. Maroney, supra, as stated in Coolidge v. New Hampshire, supra at 463 n.20, that given a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station, is applicable to the case at bar.

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* Discussion of the facts of Chambers v. Maroney, 399 U.S. 42 (1970) in Coolidge v. New Hampshire, 403 U.S. 443, 463 n.20 (1970).

CONCLUSION

For the foregoing reasons, there are no non-frivolous issues which may be raised on appeal for this Court's review. Accordingly, the motion pursuant to Anders v. California, 386 U.S. 738 (1967), should be granted and Henry F. Minnerop relieved as Mr. Smith's counsel on appeal.

Respectfully submitted,

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